No. 80-1685

MAY 2 1981
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In the Supreme Court of the United States

OCTOBER TERM, 1980

PACIFIC DEVELOPMENT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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These consolidated cases arise out of the Commissioner of Internal Revenue's jeopardy assessment of income taxes, exceeding $4.5 million, against Tongsun Park on January 18, 1977 (Pet. App. 3a). Pursuant to that jeopardy assessment, the Service levied upon the assets of petitioner Pacific Development, Inc. (PDI), a corporation wholly owned by Tongsun Park, on the ground that PDI was merely an alter ago of Park. (See, in this respect, *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-351 (1977).)

Valley Finance, Inc. (Valley), another corporation wholly owned by Tongsun Park, and the three individual petitioners brought suit in the United States District Court for the District of Columbia for wrongful levy under Section 7426(a) of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. 15-16, 26). The only interest of the three individuals was as general or unsecured creditors of PDI. The court of

appeals held that Section 7426(a) did not grant general creditors a cause of action and affirmed the district court's dismissal of the action as to the three individuals (Pet. App. 7a-9a). Although Valley was a secured creditor, entitled to sue under Section 7426(a), the court dismissed its suit because its security interest was primed by the government's tax lien (Pet. App. 9a-10a).

Petitioner PDI also brought suit for wrongful levy under Section 7426 (Pet. 26). Suit under the provisions of Section 7426 is the appropriate course of action for an alleged alter ego corporation which denies that status, and claims that its assets should not have been seized to pay the tax debts of its alleged principal. *Al-Kim, Inc.* v. *United States*, 610 F. 2d 576, 579-580 (9th Cir. 1979); *Flores* v. *United States*, 551 F. 2d 1169, 1174-1175 (9th Cir. 1977). But petitioner PDI's suit was limited by Section 7426(c), which provides that, for actions brought under Section 7426, the tax assessment "shall be conclusively presumed to be valid" (see Pet. 16). Hence, petitioner PDI had no right to claim under Section 7426 that Tongsun Park did not owe the tax assessed in the jeopardy assessment. The courts below therefore correctly accepted the validity of the Commissioner's jeopardy assessment.[1]

Petitioner PDI also claims (Pet. 31-35) that the Service's failure to issue to it a notice of deficiency for the taxes assessed against Tongsun Park constituted a violation of its rights. But the court of appeals correctly rejected this contention (see Pet. App. 11a). Under Section 6212 of the Code it is the taxpayer who is entitled to a notice of deficiency. Tongsun Park received the appropriate notice of deficiency and is contesting the deficiency in *Park* v. *Commissioner*, No. 3410-77, in the Tax Court. Insofar as PDI is the alter

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[1]The propriety of that assessment is currently before the Tax Court in *Park* v. *Commissioner*, No. 3410-77.

ego of Tongsun Park, notice to him was notice to it, and there is no purpose to be served by a separate notice of deficiency. On the other hand, if PDI is not an alter ego of Park, then it is a third party which has no authority to litigate Park's tax liability. See Section 7426(c) of the Code. In either event, there was no need for PDI to receive a notice of deficiency.

Finally, petitioner PDI complains (Pet. 35-37) that the court of appeals erred in ruling that it was the alter ego of Tongsun Park and in disregarding its separate corporate existence in the absence of a showing of fraud or unconscionable conduct. In fact, the court of appeals simply followed its earlier precedent in *Quinn* v. *Butz*, 510 F. 2d 743, 758-760 (1975), holding that one seeking to have the separate existence of an alter ego corporation disregarded need only show that recognition of the separate existence would visit "an injustice upon him." The court of appeals ruled that the Commissioner's inability to collect taxes would be such an "injustice" that would warrant disregarding the existence of Park's alter ego corporation (Pet. App. 16a). This ruling is in accord with *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351 (1977), and with the opinions of at least two other courts of appeals. *Avco Delta Corp. Canada Ltd.* v. *United States*, 540 F. 2d 258, 264-265 (7th Cir.), cert. denied, 429 U.S. 1040 (1976); *Terrapin Leasing, Ltd.* v. *United States*, No. 79-1086 (10th Cir. Apr. 6, 1981).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05